Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

STEPHEN R. PARKER AND DYKE FERRELL,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BEN L. KRAGE
RALPH S. JANVEY
KRAGE & JANVEY, L.L.P.
2600 San Jacinto Tower
2121 San Jacinto Street
Dallas, Texas 75201
(214) 969-7500

Attorneys for Petitioners

2600

QUESTIONS PRESENTED

1. Does the district court's determination that a subject investment was not a security (in a case where jurisdiction is premised solely on federal securities laws) require the court to vacate a previously entered consent judgment produced by a settlement with some of the defendants who had agreed that the district court had subject matter jurisdiction?

2. Can parties, by agreement, confer on the district court subject matter jurisdiction to render an agreed permanent injunction where the court subsequently decides an issue which would deprive the court of jurisdiction to hear the dispute?

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case. Both Petitioners, Stephen R. Parker and Dyke Ferrell, are individuals and not Corporate Entities.

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In The

Supreme Court of the United States

October Term, 2001

Stephen R. Parker and Dyke Ferrell,

Petitioners

v.

Securities and Exchange Commission,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Stephen R. Parker and Dyke Ferrell hereby petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Underlying this Petition is an enforcement action initiated by the Securities and Exchange Commission (the "SEC") alleging that twenty defendants (the "Kinlaw Defendants"), including Petitioners, committed violations of federal securities laws. Prior to trial, the Petitioners and eight other Kinlaw Defendants entered into consent judgments based upon the foregoing SEC claims. The remaining ten Kinlaw Defendants proceeded to trial, where the district court held that the subject investment was not a security.

Following that determination, the district court dismissed the case on the merits. In light of the district court's "no security" determination, Petitioners sought to vacate their consent judgments based upon lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 60(b)(4). The district court subsequently denied Petitioners' 60(b)(4) motion based on the rationale from *Bell v. Hood*, 327 U.S. 678 (1945). The Court of Appeals affirmed.

Petitioners respectfully submit that the judgments against them should be vacated pursuant to Rule 60(b)(4), and respectfully request review by this Court.

OPINIONS BELOW

The Order denying Appellants' Petition for Panel Rehearing in the Court of Appeals for the Fifth Circuit is set forth in the Appendix to this petition at page A1. The decision of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court is set forth in the Appendix to this petition at page A2, and at 2001 U.S. App. LEXIS 11453, May 14, 2001, Decided, (Decision Without Published Opinion). The opinion of the United States District Court for the Northern District of Texas is set forth in the Appendix to this petition at pages A3-A10.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment affirming the decision of the district court on May 14, 2001.

The Court of Appeals entered its order denying the Petition for Panel Rehearing of Appellants Stephen R. Parker and Dyke Ferrell on July 9, 2001. This petition for

writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. III, Sec. 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .

Title 28 United States Code § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 15 United States Code § 78aa:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

Federal Rule of Civil Procedure 60(b)(4):

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the following reasons: . . . (4) the judgment is void; . . .

STATEMENT OF THE CASE

On September 30, 1993, the Securities and Exchange Commission filed a complaint against Kinlaw Oil Corporation, Kinlaw Securities Corporation, two of the companies' officers, Joe D. Kinlaw and Mathew Akin, and sixteen salesmen, including Petitioners Parker and Ferrell (the parties named in the complaint shall hereinafter be collectively referred to as the "Kinlaw Defendants"). The Commission claimed that the Kinlaw Defendants were engaged in the offer and sale of investment contract securities, specifically, joint venture interests (the "Joint Venture Interests") in certain oil and gas leases, and that they had each violated the securities registration and anti-fraud provisions of the federal securities laws in offering and selling such interests.

By November 13, 1995, the Kinlaw Defendants, some jointly, others individually, all filed motions to dismiss or in the alternative for summary judgment on the basis that the Joint Venture Interests at issue were not "securities" within the meaning of the Securities Act and the Exchange Act and sought dismissal of the SEC's claims against them for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1) or in the alternative FED. R. CIV. P. 56. The district court denied the motions, based upon the pleadings of the SEC and a determination that issues of fact existed regarding, among other things, whether the Joint Venture Interests were "securities."

Ten of the Kinlaw Defendants, including Parker and Ferrell, settled with the SEC and agreed to permanent injunctions. The district court directed entry of an Order of Permanent Injunction and Other Equitable Relief (the "Consent Judgments") against Parker and Ferrell on August 28, 1996 and December 18, 1997, respectively. The Consent Judgments permanently enjoin Petitioners from

future violations of the securities registration and anti-fraud provisions of the federal securities laws. Both Petitioners consented to the Consent Judgments, without admitting or denying any of the allegations set out in the SEC's Complaint, but agreeing that the district court had subject matter jurisdiction over the action.

The remaining Kinlaw Defendants chose to proceed to trial, which commenced in early 1999. On July 21, 1999, the district court issued Findings of Fact and Conclusions of Law, ruling that the Joint Venture Interests were not securities subject to the cognizance of the federal securities laws, and dismissed the SEC's claims against all litigating defendants.

On August 6, 1999, the district court entered an Amended Final Judgment which stated that the Consent Judgments entered against Petitioners before trial would be enforced.

On January 25, 2000, Petitioners each filed motions to vacate their Consent Judgments under Rule 60(b)(4) claiming the Consent Judgments were void for lack of subject matter jurisdiction. The district court denied the motions to vacate on April 10, 2000. In doing so the district court determined that it had subject matter jurisdiction and that the Consent Judgments could be enforced accordingly.

On June 9, 2000, Petitioners filed timely notices of appeal pursuant to FED. R. APP. P. 4(a)(1)(B). After considering the briefs and hearing arguments of counsel, the United States Court of Appeals for the Fifth Circuit affirmed the district court's order on May 14, 2001, concluding that the district court had not abused its discretion[1] in

[1] The Court of Appeals applied an erroneous standard of review of the district court's order by considering only whether the district court had

denying the Rule 60 motions at issue. Petitioners then submitted a Petition for Panel Rehearing pursuant to FED. R. APP. P. 40 which was denied on July 9, 2001.

Petitioners now request a writ of certiorari in this Court and thereby seek review of the Decision of the district court denying their motions to vacate their Consent Judgments under Rule 60(b)(4) claiming the Consent Judgments were void for lack of subject matter jurisdiction, and the Court of Appeals' affirmance.

REASONS FOR GRANTING THE PETITION

1. The courts below misapplied the rationale of *Bell v. Hood,* relating to motions to dismiss, and gives this Court an opportunity to clarify an important question of federal court subject matter jurisdiction jurisprudence.

In this case the sole basis alleged by the SEC in its complaint for federal court subject matter jurisdiction was also an essential element of the SEC's federal cause of action, *i.e.*, the sale of a security. Defendants/Petitioners' motions to dismiss or alternatively for summary judgment on the basis that the investment being sold was not a security were originally denied by the district court. Subsequently, following a trial, the district court concluded that the investments were not securities. This conclusion deprived the district court of jurisdiction over the subject matter of the dispute. *See American Bank & Trust Co. v. Wallace,* 702 F.2d 93 (6th Cir. 1983) (promissory note made in connection with a commercial loan transaction held not to be a security; thus, district court lacked subject

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abused its discretion. The proper standard was a *de novo* review. *Carter v. Fenner,* 136 F.3d 1000, 1005 (5th Cir. 1998).

matter jurisdiction where civil action was based solely on federal securities laws).

Once the district court had reached the conclusion that this case did not involve the sale of securities, it had jurisdiction to do only one thing, to dismiss. In accordance with the rationale of *Bell v. Hood,* 327 U.S. 678, 682 (1945), the court dismissed the case on the merits because an essential element of the plaintiff's cause of action was also the premise for federal subject matter jurisdiction. *See also Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. 1981) ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.")

The district court denied Petitioners' Rule 60(b)(4) motion to vacate based on a void judgment on the *Bell v. Hood* motion to dismiss rationale and the Court of Appeals affirmed on the same basis. However, this case did not arise in the context of a motion to dismiss but in the context of a motion to vacate a void order because the court lacked subject matter jurisdiction.

Plainly, a judgment made by a court without subject matter jurisdiction is void. *See Carter v. Fenner,* 136 F.3d 1000, 1006 (5th Cir. 1998).

Once the district court made the determination that the investment at issue did not involve a sale of securities, the district court had effectively ruled that it had no subject matter jurisdiction under the federal securities laws. *See e.g., National Bank of Commerce v. All American Assurance Co.,* 583 F.2d 1295, 1298-1300 (5th Cir. 1978) (district court had no subject matter jurisdiction because plaintiff

could not demonstrate the underlying transaction involved a security); *Matek v. Murat*, 638 F. Supp. 775, 784 (C. D. Ca. 1986) (finding that general partnership interests were not securities deprived court of subject matter jurisdiction over cross-claims brought entirely under federal securities laws); *CFTC v. Nahas*, 738 F.2d 487, 491-93 (D.C. Cir. 1984) (district court had no subject matter jurisdiction in the excess of that provided by Commodities Exchange Act; judgment granting agency request to enforce administrative subpoena on foreign citizen served in foreign country held void).

The outcome of this case should not depend simply on the timing of when the district court signed the Consent[2] Judgments. Defects in subject matter jurisdiction cannot be waived and can be raised on appeal or collaterally at anytime irrespective of whether the district court previously ruled on the claimed defect. 13 C. WRIGHT, A. MILLER AND M. CAINE, FEDERAL PRACTICE AND PROCEDURE § 3522, at 66-68 (2nd Ed. 1984). Simply because the Consent Judgment in this case was rendered and signed by the district court before it concluded that the SEC's case did not involve the sale of securities should be of no moment.

This case is best analyzed if we transpose the timing of the signing of the Consent Judgment. Assume for the sake of argument that Petitioners settled with the SEC prior to trial and signed Consent Judgments, but the SEC held those

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[2] That Parker and Ferrell consented to the district court's jurisdiction is unavailing to whether the court's Consent Judgment was void. Federal district courts have narrowly limited jurisdiction which cannot be extended by consent or waiver. *Marathon Oil v. Ruhr Gas*, 145 F.3d 211, 217 (5th Cir. 1998); *A. L. Rowen & Son, General Contractors, Inc. v. Department of Housing and Urban Development*, 611 F.2d 997, 998 (5th Cir. 1980); *Giancana v. Johnson*, 335 F.2d 366, 367-68 (7th Cir. 1964).

Consent Judgments and did not submit them to the trial court for signing until after the trial and after the making of the determination by the district court that the case did not involve the sale of securities. If the SEC had then submitted the Consent Judgments to the district court for signing, the court would have lacked jurisdiction to do so. Once the determination was made that the underlying transactions in this case did not involve the sale of securities, all the court could do thereafter is dismiss the case, whether on the merits or for lack of subject matter jurisdiction is irrelevant to whether or not the court would then have subject matter jurisdiction to sign the Consent Judgments. If it must be concluded, as it must, that the district court would not have had jurisdiction to sign the Consent Judgments after it had determined that the underlying transactions did not involve the sale of securities, the mere fact that the Consent Judgments were signed prior to that determination should not affect whether or not they are void for the court's lack of subject matter jurisdiction.

CONCLUSION

The courts below validated a district court's permanent injunction enforcing federal securities laws when the court had no subject matter jurisdiction to do so. This Court should grant the Petition for Writ of Certiorari so as to clarify the holding in *Bell v. Hood* and provide important guidance for the enforcement of the federal securities laws in United States courts.

Respectfully submitted,

/s/ BEN L. KRAGE
BEN L. KRAGE
RALPH S. JANVEY
KRAGE & JANVEY, L.L.P.
2600 San Jacinto Tower
2121 San Jacinto Street
Dallas, Texas 75201
214-969-7500
Telecopy No. 214-220-0230
Attorneys for Petitioners Stephen R. Parker and Dyke Ferrell

APPENDIX

U.S. COURT OF APPEALS
FILED
JUL 9, 2001
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10568

SECURITIES AND EXCHANGE COMMISSION
Plaintiff - Appellee

v.

KINLAW SECURITIES CORPORATION; ET AL
Defendants

JOE D KINLAW; STEPHEN R PARKER;
DYKE FERRELL
Defendants - Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS

ON PETITIONS FOR REHEARINGS

Before POLITZ and BARKSDALE, Circuit Judges, and FALLON,* District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing are DENIED.

ENTERED FOR THE COURT:

/s/ (ILLEGIBLE)
United States Circuit Judge

* District Judge of the Eastern District of Louisiana, sitting by designation.

REHG-13

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE MANDATE

U.S. COURT OF APPEALS
FILED
MAY 14 2001
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10568

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

versus

KINLAW SECURITIES CORPORATION; ET AL.,
Defendants,

JOE D. KINLAW; STEPHEN R. PARKER;
DYKE FERRELL,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(3:93-CV-2010-T)

Before POLITZ and BARKSDALE, Circuit Judges, and FALLON,[1] District Judge.

PER CURIAM:[2] Having considered the briefs and pertinent parts of the record, and having heard the arguments of counsel, and essentially for the reasons stated in the district court's order, we conclude the district court did *not* abuse its discretion in denying the Rule 60 motions at issue.

AFFIRMED

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[1] District Judge of the Eastern District of Louisiana, sitting by designation.

[2] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should *not* be published and is *not* precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 10, 2000
NANCY DOHERTY, CLERK
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

ENTERED ON DOCKET NO. 3:93-CV-2010-T
APR 11, 2000
U.S. DISTRICT CLERK'S OFFICE

v.

KINLAW SECURITIES CORPORATION, et al.,
Defendants.

ORDER DENYING MOTIONS TO VACATE FINAL JUDGMENT

Before the Court are motions to vacate final judgment pursuant to Federal Rule of Civil Procedure 60, filed by Defendants Joe D. Kinlaw, Dyke Ferrell, and Stephen R. Parker (Movants). The motions are opposed. After consideration, the Court believes the motions should be denied.

The facts of this case are complex and fully set out in the Court's Findings of Fact and Conclusions of Law, *SEC v. Kinlaw Sec. Corp.*, No. 3:93-CV-2010-T, slip op. (N.D. Tex. July 21, 1999). Therefore, an exhaustive recitation of the facts is not necessary. In short, Plaintiff Securities and Exchange Commission (SEC) filed this complaint in September 1993 against Kinlaw Oil Corporation, its president Joseph D. Kinlaw, Kinlaw Securities Corporation (an affiliated broker-dealer corporation), its vice-president of exploration Matthew Akin, and sixteen brokers employed by Kinlaw Securities Corporation. The SEC alleged that De-

fendants, including Movants, participated in a fraudulent scheme to raise money for oil and gas ventures by telephone solicitation from sales offices in Dallas. The SEC claimed that Movants made materially false statements to investors in violation of section 17(a) of the Securities Act of 1933, Title 15 U.S.C. § 77q(a), and Section 10(b) of the Securities Act of 1934, Title 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The SEC also claimed that Movants violated the registration provisions in sections 5(a) and 5(c) of the Securities Act of 1933, Title 15 U.S.C. §§ 77e(a) and 77e(c).

Ten Defendants, including Movants, elected to settle with the SEC.[1] The remaining ten Defendants chose to proceed to trial. On August 6, 1999, the Court entered an Amended Final Judgment dismissing the SEC's complaint on the ground that the joint venture interests at issue did not constitute securities within the meaning of section 2(1) of the Securities Act of 1933, and section 3(a)(10) of the Securities and Exchange Act of 1934. The Amended Final Judgment also provided that the Final Judgments of Permanent Injunction and other Equitable Relief previously entered against Defendants who elected to settle with the SEC, including Movants, were valid and remained in full force and effect.

A motion under Rule 60 will only be granted in "unique circumstances." *Pryor v. United States Postal Serv.*,

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[1] The Court entered a Final Judgment of Permanent Injunction and Other Equitable Relief against Joe D. Kinlaw on July 27, 1995, against Parker on August 28, 1996, and against Ferrell on December 18, 1997 — all pursuant to stipulated agreements.

769 F.2d 281, 287 (5th Cir. 1985). Furthermore, the movant must show that he is entitled to relief under one of the specific grounds of Rule 60. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 356 (5th Cir. 1933). Joe D. Kinlaw brings this motion pursuant to Rule 60(b)(4), (b)(5), and (b)(6). Ferrell and Parker bring their motions solely under section (b)(4) of Rule 60. Because Movants rely on the same argument — which the Court rejects — to obtain relief under all of the Rule 60 grounds asserted, the Court need not address the hypothetical applicability of a specific Rule 60 ground to this situation.

Movants argue that since the Court dismissed the SEC's complaint against the Defendants who chose to proceed to trial for lack of subject matter jurisdiction, the Court had no subject matter jurisdiction to enter final judgments against Movants. This argument is specious, both in fact and in light of well-established, controlling law. The Court did not dismiss the SEC's complaint against the Defendants who chose to proceed to trial for lack of subject matter jurisdiction. The Court concluded that because the question of "whether the joint venture interests are securities reaches the merits of the case, the dismissal is with prejudice and not simply a dismissal for lack of subject matter jurisdiction." *SEC v. Kinlaw Sec. Corp.*, No. 3:93-CV-2010-T, slip op. at 20 n.4 (N.D. Tex. July 21, 1999) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946) & *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981)). Movant seize upon the slight ambiguity in this sentence to argue that the Court somehow meant to dismiss the case both on the merits and for lack of subject matter jurisdiction. While perhaps the omission of the word "simply" in the above

quoted sentence might have made the Court's intent clearer, the interpretation urged by Movants makes no sense whatsoever in light of the holdings of *Bell* and *Williamson*, and would in fact constitute reversible error.

"It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *see generally* 13B Charles Alan Wright & Arthur R. Miller et al. *Federal Practice and Procedure* § 3564 (2d ed. 1984). "Jurisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Steel Company*, 523 U.S. at 89. (quoting *Bell v. Hood*, 327 U.S. at 682); *Green v. Ferrell*, 664 F.2d 1292, 1294 (5th Cir. 1982) (citing *Bell v. Hood*) ("A plaintiff's failure to state a meritorious cause of action does not defeat subject matter jurisdiction."). A district court has jurisdiction to hear a case if the right of the plaintiff to recover under its complaint will be sustained if a federal law is given one construction and will be defeated if it is given another, unless the claim is facially insubstantial or frivolous. *Steel Company*, 523 U.S. at 89. "But if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

In *Williamson v. Tucker*, the United States Court of Appeals for the Fifth Circuit fully explained the applicability of this concept to a similar dispute as here — whether

certain joint venture interests constituted securities within the definitions of the Securities Act of 1933 and the Securities Exchange Act of 1934. In that case the Court held:

> Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court (assuming that the plaintiff's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. The Supreme Court has made it clear that in that situation no purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits . . . Therefore as a general rule a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action. The exceptions to this rule are narrowly drawn, and are intended to allow jurisdictional dismissals only in those cases where the federal claim is clearly immaterial or insubstantial.

645 F.2d at 415-416 (footnotes omitted). In *Williamson,* the Fifth Circuit held that the district court's dismissal of the case prior to trial was impermissible absent a finding that the plaintiff's claims were clearly frivolous and insubstantial. Movants do not argue that the SEC's claims were

frivolous and insubstantial in this case.[2] Rather, they argue that the holdings of *Bell* and *Williamson* only apply to pretrial motions to dismiss. There is nothing in these cases that suggests such a limitation on their holding; moreover, this argument has been foreclosed by the Fifth Circuit in *Fragumar Corp. v. Dunlap*, 685 F.2d 127 (5th Cir. 1982).[3] In *Fragumar*, the question before the district court was also whether certain joint venture interests constituted securities under the definitions of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id.* at 128. The case proceeded to trial. At the close of the plaintiff's case, defendants moved to dismiss for lack of subject matter jurisdiction. or in the alternative, for a directed verdict. *Id.* The district judge dismissed the case for lack of subject matter jurisdiction, without ruling on the motion for a directed verdict because he believed he had no jurisdiction to do so. *Id.* The Fifth Circuit reversed, holding that "[w]hile it is correct that a court without jurisdiction of a case cannot rule on its merits, it is incorrect to assume that the basis for determining jurisdiction is the record after trial and that failure to prove the claim results in loss of jurisdiction." *Id.* The court, citing *Williamson*, also held that the definition of the term security reached the merits of the

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[2] The Court would reject any such argument if it were made. *See* Order Denying Motions for Attorney's Fees, *SEC v. Kinlaw Sec. Corp.*, No. 3:93-CV-2010-T, slip op. at 4 (N.D. Tex. March 21, 2000) (holding that the determination of whether the joint venture interests at issue fit the statutory definitions for securities was a "close question.")

[3] For reasons unknown to the Court, none of the parties reference the *Fragumar* case in their motion papers.

case, and that the extensive pretrial proceedings and lengthy trial indicated that the issue was not so frivolous or insubstantial as to warrant dismissal for lack of subject matter jurisdiction. *Id.* at 129. Even more pertinent to the disposition of Movants' argument, is the Fifth Circuit's holding that a district court is not permitted to a dismiss such a case for lack of subject matter jurisdiction "after trial on the merits." *Id.*

The Court properly issued Findings of Fact and Conclusions of law dismissing the SEC's complaint against the non-settling Defendants on the merits. If the Court had dismissed the SEC's complaint against the non-settling Defendants after trial for lack of subject matter jurisdiction, it would have committed reversible error, just as did the district judge in *Fragumar. Id.* Since the issue of whether the joint venture interests sold by Defendants in this case reached the merits of the SEC's case, and the SEC's claims were not frivolous or wholly insubstantial, the Court had subject matter jurisdiction over this case. Accordingly, the Court had subject matter jurisdiction to enter final judgments against Movants.

It is therefore **ORDERED** that the Motion to Vacate Final Judgment, filed by Defendant Dyke Ferrell on January 25, 2000, is **denied.**

It is **FURTHER ORDERED** that the Motion to Vacate Final Judgement, filed by Defendant Stephen R. Parker on January 25, 2000, is **denied**.

It is **FURTHER ORDERED** that motion to vacate final judgment, filed by Defendant Joe D. Kinlaw on February 2, 2000, is **denied**.

Signed this 10th day of April, 2000.

/s/ ROBERT B. MALONEY
Robert B. Maloney
U.S. District Judge